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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1125.

LEON FERGUSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI.

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This Supplemental Brief is being filed pursuant to Rule 24 (5) of this Court's rules. It is being filed to correct a serious misrepresentation of facts contained in Respondent's Brief in Opposition.

Respondent's central argument is that new evidence was introduced for the first time on appeal and that the petition for certiorari should be denied for that reason. *There was no new evidence introduced on appeal.* By the express provisions of Section 2953.21 (C), Ohio Revised Code, quoted verbatim on page 4 of the Petition for Certiorari, all records, journal entries and court reporter's transcripts are before the trial court in a post-conviction relief proceeding. Further, the statute imposes upon trial courts a *duty* to order court reporter's transcripts if relevant to its determination of a petition for post-conviction relief. *It must be emphasized that the trial judge hearing the petition for post-conviction relief in the subject case was the same judge who accepted the guilty plea allegedly*

made on petitioner's behalf.[1] In claiming that the proceedings previously concluded by the trial judge were not before him in the petition for post-conviction relief, respondent not only overlooks the fact that the trial judge was bound to take notice judicially of these proceedings but also misleads this Court with respect to Section 2953.21 (c) of the Ohio Revised Code. The fact that the trial court in this case precipitously rendered its judgment without ordering or checking a transcript of earlier proceedings, if it thought such transcript was material, changes nothing.

Petitioner attached to his petition for post-conviction relief the *complete* transcript of the hearing at which *for the first time* he entered a guilty plea. Petitioner contends that that transcript is the only one necessary to determine the issues posited here. It is undisputed that at no time during the May 22 hearing did the trial court make any effort to explain to petitioner his constitutional rights, to ascertain whether the plea of guilty was entered voluntarily, knowingly and intelligently, or to apprise him of the possible consequences of a guilty plea. Nor was such advice or admonition given *at any previous hearing*. The burden of establishing the validity of a guilty plea is on the State, *Crosby v. Brierley*, 404 F.2d 790, 796 (3rd C.A. 1968).

Respondent apparently would like this Court to confine its consideration to the May 22, 1964, transcript at which time the trial court said, "Of course at an earlier time we went over all the constitutional waivers, *I be-*

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[1] In Ohio, as elsewhere, it is well established that a trial court takes judicial notice of its own proceedings in the immediate case under consideration. *Meyers v. State*, 46 Ohio St. 473, 22 N.E. 43 (1889). Pursuant to Ohio practice the petition for post-conviction relief was filed under the same case number assigned at the time of the indictment.

*lieve * * *.*" (emphasis added); and then to conclude that the constitutional waivers were in fact explained, *even though the record belies it!*

CONCLUSION.

There is not a scrap of evidence anywhere in the record of this case which shows that petitioner knew what he was doing when the guilty plea was entered. Petitioner at no time entered such a plea. The presence of an attorney, by itself, has been deemed insufficient for a showing of compliance with Due Process imperatives at the time a guilty plea is entered. See *Brookhart v. Janis*, 384 U.S. 1, 8 (1966); *Crosby v. Brierley, supra; Codarre v. Gilligan*, 363 F.2d 961 (2 Cir. 1966); *State v. Sisco*, 169 N.W.2d 542, 548 (Iowa Sup. Ct. 1969)[2]; *Alexander v. State*, 226 S.2d 905 (Miss. Sup. Ct. 1969). Guesswork and supposition will not suffice either. Petitioner should be permitted to re-plead with the State of Ohio reserving the right to try him if the plea is not guilty. In any event this case presents serious Sixth and Fourteenth Amendment constitutional issues which warrant this Court's attention. For that reason the petition for certiorari should be granted.

Respectfully submitted,

JERRY GORDON,
Counsel for Petitioner.

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[2] The Court said, "[A] sentencing court may not abrogate or delegate to anyone, *including attorney for accused*, the duty to determine defendant's knowledge of the charge, appreciation of legal consequences of a guilty plea, whether it is voluntarily entered, or existence of facts supporting it." (Emphasis added.)